IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.934 OF 2006
IN
CRIMINAL APPEAL NO.102 OF 2005

Vishal Vithal Shelke Applicant
versus
The State of Maharashtra Respondent

Shri V.D.Sapkal with A.S.Gaikwad for applicant.
Mrs.M.M.Deshmukh, APP for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 8th September 2006

PC :

1. In this Criminal Appeal which was mentioned by learned advocate appearing for the appellant before me, the oral request was it be taken up immediately or else appropriate orders be passed so that the appellant is released from prison, if not required in any other case.

2. Subsequently, this matter was placed for directions at the request of learned advocate and he presented a written application containing the above request.

3. Shri Gaikwad and Shri Sapkal appearing for the appellant-accused pointed out to me that the appellant-accused was named as an accused in two

CRs bearing Nos.402 of 1997 which was registered on 29th December 1997 and CR No.309 of 1999. As far as CR No.402 of 1997 is concerned, the offence lodged is punishable under sections 307 and 452 of IPC.. The applicant-accused was arrested in CR No.402 of 1997 on 5th January 1998. After completion of investigation charge sheet was filed and the case was committed to the Sessions Court, Greater Bombay and numbered as Sessions Case No.1206 of 1998. It is contended that during the trial of this case the applicant was released on bail after fifteen days of his arrest. However, he was arrested on 1st July 1999 in connection with CR No.309 of 1999 which was registered with Mahim Police Station for offence punishable under section 302 of IPC.. The case was committed to Sessions Court, Greater Bombay and numbered as Sessions Case No.1306 of 1999. As far as this CR is concerned, the trial concluded earlier than that of the other CR and by a judgement and order dated 8th/9th August 2001 the appellant-accused was convicted for the offence of murder and sentenced to undergo imprisonment for life. That order is at page 43 of the application paper book.

4. As far as earlier CR of 1997 is concerned,

the Sessions Court judgement therein was delivered on 18th June 2004 and the applicant-accused was convicted for offences punishable under sections 307 and 452 of IPC and sentenced to undergo rigorous imprisonment for five years as far as Section 307 and as far as offence punishable under section 452, he was directed to undergo rigorous imprisonment for three years. The order dated 18th June 2004 reads thus :-

> "i) Accused is held guilty of the offence punishable under section 307 of I.P.C. and he is sentenced to suffer R.I. for five years and to pay a fine of Rs.500/-. In default of payment of fine, further R.I. for six months.
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> ii) Accused is also held guilty of the offence punishable under section 452 of I.P.C. and he is sentenced to suffer R.I. for 3 years and to pay a fine of Rs.500/-. In default of payment of fine, further R.I. for six months.
>
> iii) Accused is not held guilty of the offence punishable under section 324 of I.P.C. and he is acquitted.
>
> iv) The substantive sentences to run concurrently.
>
> v) Set off is given for the period for which the accused was already in the jail in this case.
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> vi) Muddemal property, articles 1 to 14 now being worthless, be destroyed after appeal period is over.
>
> vii) Copy of this judgement be delivered

to the accused immediately."

A bare reading of the same would indicate that the substantive sentences were directed to run concurrently.

5. Being aggrieved and dissatisfied by the order of conviction and sentence in Sessions Case No.1206 of 1998 arising out CR No.402 of 1997, the applicant-accused has preferred instant criminal appeal before this Court.

6. This criminal appeal was admitted and it is pending for hearing and final disposal.

7. In the mean while, the applicant’s appeal against this conviction and sentence imposed in CR No.309 of 1999 (life imprisonment) being Appeal No.52 of 2001 was heard by a Division Bench of this Court and by a judgement pronounced on 15th February 2006 the said appeal was allowed. The order of conviction and sentence delivered on 9th August 2001 by the Additional Sessions Judge, Mumbai in Sessions Case No.1376 of 1999 was quashed and set aside. The specific direction of this Court is that the appellant-accused is acquitted of the charge

levelled against him and he be set at liberty forthwith, if not required in any other case.

8. Learned counsel appearing for the appellant contends that once the appellant-applicant was undergoing life imprisonment from 1st July 1999 till it was set aside on 20th February 2006, his conviction and sentence in the earlier sessions case, although decided subsequently and the period of sentence undergone therein would have to be considered and taken into account when he was undergoing life imprisonment. In other words, the contention is that the judgement and order delivered in the earlier CR on 18th June 2004 sentencing the appellant to undergo rigorous imprisonment for the period specified therein, would not mean that the appellant-accused must undergo the period of sentence awarded from the date of judgement till the term specified therein. Thus, the period of five years ought not be reckoned from 18th June 2004. Either which way one looks it at, the period is over because of the specific direction therein and the appellant must set at liberty forthwith.

9. The submission is that the life sentence is now set aside. The period for which the

appellant was sentenced in the other sessions case, has also expired. Therefore, he be released forthwith if not required in any other case.

10. For this purpose reliance is placed upon Section 427 of Code of Criminal Procedure which reads thus :-

> "427. Sentence on offender already sentenced for another offence-
>
> (1) when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.
>
> Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.
>
> (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

11. On the other hand, learned APP submits that as far as State of Maharashtra is concerned, it's Jail Manual in Chapter-34 deals with execution of orders of Court and release of prisoners. She submits that under Part-II thereof the execution of sentence and orders of Courts, is specifically dealt with. Para 19 of this manual is pressed into service. She submits that in the judgement and order delivered on 18th August 2004 which is subject matter of this appeal, the appellant-accused is held guilty of offence punishable under section 307 of IPC and sentenced to suffer R.I. for five years. He was held guilty of the offence under section 452 of the IPC and sentenced to suffer R.I. for three years. The substantive sentence were to run concurrently. She submits that thus the appellant is sentenced for five and three years respectively. Even if the sentence is to run concurrently, the period would expire after five years i.e. in 2008. This is after all benefits admissible under law are conferred and extended to the appellant. She, therefore, submits that the application seeking a direction of release of the appellant-applicant deserves to be dismissed. She has relied upon the Prison Manual in this behalf.

12. Learned advocate appearing for the appellant-accused has placed reliance upon Section 428 of Cr.P.C. as well and has contended that a decision reported in (2001)6-SCC-311 (State of Maharashtra and another Vs. Najakat Ali Mubarak Ali) would cover the case.

13. The dates and events being undisputed, the only question that would require determination by me is whether the case of the applicant falls under sub section 2 of section 427 of Cr.P.C. or not. Section 427 of Cr.P.C. has been reproduced by me above.

14. A bare perusal of the section would indicate that the Legislature was aware of the fact that the accused may be sentenced in two cases. A case of a person already sentenced to suffer imprisonment for life being sentenced subsequently for life or for a term for another offence is specifically covered by Section 427. Sub section 1 thereof states that a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall

commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. It is not necessary to refer to proviso to said sub section.

15. However, sub section 2 which has been held to be an exception to sub section 1, deals with a case of a person undergoing a sentence of imprisonment for life being convicted on a subsequent conviction to imprisonment for a term or imprisonment for life and in that event the subsequent sentence shall run concurrently with such previous sentence, is the mandate flowing from sub section 2. In a decision reported in AIR-1991-SC-2269 = (1991)4-SCC-304 (Ranjit Singh Vs. Union Territory of Chandigarh and another) a Three Judge Bench of Hon’ble Supreme Court was called upon to reconcile a direction issued by Supreme Court itself and clarify it in tune with the mandate of sub section 2 of section 427.

16. The Supreme Court speaking through Justice J.S.Verma (as His Lordship then was) observed as under :-

"8. Sub-section (1) of Section 427 CrPC provides for the situation when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or life imprisonment. In other words, sub-section (1) of Section 427 CrPC deals with an offender who while undergoing sentence for a fixed term is subsequently convicted to imprisonment for a fixed term or for life. In such a situation, the first sentence, being for a fixed term, expires on a definite date which is known when the subsequent conviction is made. Sub section (1) says that in such a situation, the date of expiry of the first sentence which the offender is undergoing being known, ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless the court directs the subsequent sentence to run concurrently with the previous sentence. Obviously, in cases covered by sub section (1) where the sentence is for a fixed term, the subsequent sentence can be consecutive unless directed to run concurrently. Sub section (2), on the other hand, provides for an offender "already undergoing sentence of imprisonment for life" who is sentenced on a subsequent conviction to imprisonment for a term or for life. it is well settled since the decision of this Court in Gopal Vinayak Godse and reiterated in Maru Ram that imprisonment for life is a sentence for the remainder of the life of the offender unless the remaining sentence is commuted or remitted by the appropriate authority. This being so at the stage of sentencing by the court on a subsequent conviction, the earlier sentence of imprisonment for life must be understood in this manner and, therefore, there can be no question of a subsequent sentence of imprisonment for a term or for life running consecutively which is the general rule laid down in sub section (1) of Section 427. As rightly contended by Shri Garg, and not disputed by Shri Lalit, the earlier sentence of imprisonment for life being understood to mean as a sentence to

> serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having only one life span, the sentence on a subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub section (2) of Section 427 since the general rule enunciated in sub section (1) thereof is that without the court's direction the subsequent sentence will not run concurrently but consecutively. The only situation in which no direction of the court is needed to make the subsequent sentence run concurrently with the previous sentence is provided for in sub section (2) which has been enacted to avoid any possible controversy based on sub section (1) if there be no express direction of the court to that effect. Sub section (2) is in the nature of an exception to the general rule enacted in sub section (1) of Section 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the court directs it to run concurrently. The meaning and purpose of sub sections (1) and (2) of Section 427 and the object of enacting sub section (2) is, therefore, clear."

17. In para 9 the Hon'ble Supreme Court observes that the direction of Supreme Court issued way back on 13th September 1983 must be construed to harmonise Section 427(2) which is the statutory mandate apart from being the obvious truth.

18. Without noticing this decision of Hon'ble Supreme Court but following the mandate of the

above provisions, a Division Bench of this Court in a decision reported in (2000)- Mh.L.J.-88 (Rambhau Pandurang Wankhede Vs. State of Maharashtra) while dealing with an identical situation observed thus :-

> "6. Taking the last point first, it is worthwhile to refer to section 427 of the Code of Criminal Procedure, 1973. Section 427 governs the cases of offender already sentenced for another offence. Sub section (2) of section 427 is an exception to the general provisions contained in section 427. It will be clear from mere perusal of sub section (2) that when a person who is undergoing life imprisonment is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. The subsequent sentence in this sub section clearly means sentence passed subsequently to the sentence of life imprisonment already passed against him. It has no reference to the date of commission of offence. Therefore, obviously when it is not disputed that the rigorous imprisonment of seven years passed against the prisoner by the Sessions Court, Akola was subsequent in time than the sentence of life imprisonment passed by the Sessions Judge, Khamgaon, there remains no doubt that this sentence of 7 years has to run concurrently with the sentence of life imprisonment which the prisoner was undergoing at the time when the said sentence was awarded to him. This is not a matter of any policy and the guidelines issued under 14 year rule have nothing to do with this as it is clearly a matter of application of section 427(2) of Criminal Procedure Code."

19. In fact, the facts before the Division Bench of this Court were identical to the facts before me.

20. Thus, in the instant case when the applicant-accused who was sentenced to undergo imprisonment for life under a judgement delivered on 9th August 2001, but was arrested in Sessions case as early as on 1st July 1999, he was undergoing imprisonment for life till his appeal was decided by this Court after lapse of about four and a half years and he was acquitted. During pendency of the life sentence the appellant was convicted and sentenced under offence punishable under sections 307 and 452 of IPC on 18th June 2004. Although, the direction under that judgement is that sentence under both provisions would run concurrently, it is obvious that on the date of delivery of judgement i.e. 18th June 2004 the appellant was undergoing life imprisonment. Once he was undergoing life imprisonment, his subsequent acquittal would have no bearing admittedly on the applicability of Section 427(2). The plain reading of Section 427(2) is that the applicant- accused must get the benefit of concurrent sentencing. The case being covered by Section 427(2) and the

applicant-accused was undergoing sentence for imprisonment of life, his sentence of subsequent conviction for a term of five years and three years respectively, would have to run concurrently. It is not disputed that the appellant-applicant was undergoing a sentence of imprisonment for life on the date of his subsequent conviction and sentence. In such circumstances, the period stipulated under the subsequent conviction running concurrently, the same must be adjusted with the period of life sentence undergone by the applicant-accused. In such circumstances, his further detention is contrary to the statutory mandate. The argument that the Prison Manual or other provisions would mean that the computation must commence from the subsequent conviction and sentence, is obviously over looking sub section 2 of section 427 of Cr.P.C. as well as Prison Manual itself. Para 19 of the manual itself states that if the Court directs that the sentence must run concurrently, then obviously a different situation will arise and effect will have to be given to the direction of the Court. In such circumstances, para 19 would not apply with its full rigour and force. It is not necessary to consider larger issue as to whether there is any conflict between the

provisions of prison manual and the statutory provisions in the field.

21. Once in the fact situation before me the applicant-accused was already undergoing a sentence of imprisonment for life and was sentenced subsequently to imprisonment for a term which was directed to run concurrently, then he has completed the period of detention and sentence required to be undergone by him in the subsequent conviction as well. In such circumstances and when the term "undergoing a sentence for imprisonment" having also been construed to mean not physical custody (see Sadashiv Sabale Vs. State of Maharashtra - 1993 Cr.L.J. 1469), then the application of the applicant must succeed.

22. It is accordingly directed that the prison authorities shall forthwith release the applicant-accused and set him at liberty, if he is not required in any other case. Application disposed of accordingly.

23. Needless to state that disposal of present application does not mean disposal of criminal appeal, which is directed against both,

conviction and sentence and must therefore, be dealt with in accordance with law. Request of the accused-appellant that the appeal itself may be disposed off, cannot thus be granted. However, the appeal be listed for hearing on 19th September 2006.

24. All concerned to act on an ordinary copy of this order duly authenticated by the Registry of this Court.

(S.C.DHARMADHIKARI, J.)